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No. 02-1477

IN THE

Supreme Court of the United States

KENNETH SCOTT NIVENS
GLEN LANCE MANERS
TERRI LYNN STORK,

Petitioners,

v.

PETER S. GILCHRIST, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER ALLEGED CONFLICTS OF THE COURT OF APPEALS' DECISION WITH THOSE OF OTHER CIRCUITS JUSTIFY GRANT OF THIS COURT'S WRIT OF CERTIORARI, WHEN THOSE ALLEGED CONFLICTS ARE AT MOST INSUBSTANTIAL AND TANGENTIAL TO THE DECISION OF THIS CASE.

II. WHETHER THE COURT OF APPEALS' DECISION IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *HUDSON V. UNITED STATES*, 522 U.S. 93 (1997).

III. WHETHER PETITIONERS HAVE CITED ANY ADVERSE CONSEQUENCES THE AVOIDANCE OF WHICH WOULD MAKE THIS CASE APPROPRIATE FOR REVIEW ON CERTIORARI.

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STATEMENT OF THE CASE

Petitioners Kenneth Scott Nivens, Glen Lance Maners, and Terri Lynn Stork (hereafter collectively "petitioners") initiated this civil action in the United States District Court for the Western District of North Carolina on 18 October 2001 by mailing and faxing their complaint to defendant Peter S. Gilchrist III, the elected District Attorney for North Carolina Prosecutorial District 26, Mecklenburg County, North Carolina (hereafter "Gilchrist"). Petitioners brought their action pursuant to 42 U.S.C. § 1983, the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Fifth and Fourteenth Amendments to the United States Constitution, seeking declaratory and injunctive relief to prevent the State of North Carolina from prosecuting petitioners for criminal offenses involving the possession and sale of hundreds of "ecstasy" pills. Appendix to Brief In Opposition (hereafter "App.") at 1a-8a.

According to their complaint, petitioners were all arrested on 8 July 2000 for violations of North Carolina's criminal laws for offenses involving the sale by petitioner Stork of 15 ecstasy pills, the sale by Chad Hess of 125 ecstasy pills, the sale by petitioner Nivens of 184 ecstasy pills to petitioner Maners, and the possession of 701 ecstasy pills by petitioner Nivens in a car driven by petitioner Stork. Compl. ¶ 9, App. at 4a. Also in July of 2000, petitioners Stork, Nivens and Maners were assessed with taxes, penalties, and interest pursuant to North Carolina laws governing Unauthorized Substances Taxes (the "drug tax"), N.C. GEN. STAT. §§ 105-113.105 *et seq.*, in the

amount of $6,259.67 on the 884 ecstasy pills that were the subjects of several indictments. Compl. ¶ 10, App. at 4a-5a. In addition, petitioner Maners was assessed a tax which, with penalty and interest, amounted to $1,336.33 on the 184 ecstasy pills that were the subjects of three indictments. Compl. ¶ 11, App. at 5a. Petitioner Stork was also assessed a tax which, with interest and penalty, amounted to $1,081.13 on the 140 ecstasy pills that were the subject of four indictments. Compl. ¶ 12, App. at 5a. All of the petitioners paid the taxes in full either the month they were assessed or the following month. Compl. ¶¶ 10-12, App. at 4a-5a.

On 13 November 2001, Gilchrist moved to dismiss the complaint for lack of jurisdiction pursuant to F. R. Civ. P. Rule 12(b)(1) or to abstain from exercising jurisdiction under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and, at the same time, moved to dismiss the action for failure to state a claim upon which relief may be granted pursuant to F.R. Civ. P. Rule 12(b)(6). On 4 February 2002, the district court granted the motion to dismiss based on the *Younger* abstention doctrine, without prejudice, and denied all other outstanding motions as moot. The district court thus avoided the need to reach the question of whether the complaint failed to state a claim upon which relief may be granted. Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") at 26a-34a. A judgment of dismissal was entered the same day.

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and on 11 February 2003 the court of appeals filed its decision affirming the district court. Pet. App.

at 1a-24a. Citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the court of appeals concluded that the State of North Carolina, in its criminal prosecution of petitioners, had an ongoing proceeding that implicates important, substantial and vital interests of the State in preventing criminal violations and that petitioners have an adequate opportunity to raise their federal claims in the North Carolina courts. Accordingly, the court of appeals declared that the trial court did not abuse its discretion in abstaining unless petitioners could show that their case fell within an exception to the rule favoring abstention when a state has a pending criminal prosecution. Pet. App. at 5a-6a. The court of appeals further concluded that petitioners could not show they fell within any exception to the *Younger* abstention doctrine. In particular, petitioners did not allege bad faith or harassment, and they still have an opportunity to have the state courts address their constitutional claims. Pet. App. at 7a. Nor could they show the lack of an adequate remedy at law or the danger of irreparable injury in the absence of a preliminary injunction. Pet. App. at 8a. Although petitioners argued that the North Carolina courts had erroneously declared the State's "drug tax" constitutional while, according to petitioners, the court of appeals had reached the opposite conclusion, the court of appeals noted that North Carolina had made substantial changes to the state's drug tax laws since the events giving rise to the court of appeals' decision in *Lynn v. West*, 134 F.3d 582, 591 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998) (holding that prior, harsher version of North Carolina drug tax constituted a criminal penalty). Therefore, *Lynn* was not precedent contrary to the state courts' decisions, and petitioners could not show the

kind of futility necessary to override *Younger* and justify the issuance of a preliminary injunction. Pet. App. at 16a. Nor could petitioners show that the threat of any alleged injury was immediate and irreparable given their failure thus far to take advantage of any pre-trial proceedings available to them to raise the double jeopardy issue in state court. Pet. App. at 17a-19a. Petitioners were equally unable to show that a "great" or "substantial" likelihood existed that they would suffer any irreparable constitutional injury because the current North Carolina drug tax provisions are arguably not criminal penalties at all and, additionally, it is unclear that petitioners' prompt payment of the drug tax assessments they received from the State constituted a "prior proceeding" to trigger a double jeopardy analysis. Pet. App. at 20a-23a.

On 11 March 2003, petitioners' petitioner for rehearing and rehearing *en banc* was denied by the court of appeals. Pet. App. at 35a-36a.

REASONS FOR DENYING THE WRIT

The petition should be denied because the United States Court of Appeals for the Fourth Circuit correctly upheld the district court's decision to abstain under the principles of *Younger*, 401 U.S. 37. Petitioners' attempts to avoid criminal prosecution for the serious drug charges they face in the North Carolina criminal courts were correctly rejected by both the district court and the court of appeals. Nor have petitioners offered any valid reason for this Court to grant review. Petitioners have failed to show any conflict among the circuit

courts or any conflict between the court of appeals' decision in this case and any of this Court's opinions. Nor have they shown that they in fact have raised a serious double jeopardy claim or that they face a substantial or great threat of immediate and irreparable harm to their rights. This Court has previously rejected all petitions seeking review of cases involving the North Carolina drug tax, including cases raising double jeopardy claims by persons challenging their criminal convictions as well as related civil cases. *See State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997); *State v. Adams*, 513 S.E.2d 588 (N.C. Ct. App.), *disc. review denied*, 538 S.E.2d 570 (N.C.), *cert. denied*, 528 U.S. 1022 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 538 S.E.2d 576 (N.C.), *cert. denied*, 528 U.S. 1022 (1999); *see also Milligan v. State*, 522 S.E.2d 330 (N.C. Ct. App. 1999), *disc. review denied*, 543 S.E.2d 131 (N.C.), *cert. denied*, 531 U.S. 819 (2000); *Vick v. Williams*, 233 F.3d 213 (4th Cir. 2000), *cert. denied*, 533 U.S. 952 (2001); *Lynn v. West*, 134 F.3d 582. Petitioners' quest for review by this Court should similarly be denied.

I. THIS COURT SHOULD NOT GRANT CERTIORARI BASED ON ALLEGED CONFLICTS OF THE COURT OF APPEALS' DECISION WITH THOSE OF OTHER CIRCUITS, WHICH ARE AT MOST INSUBSTANTIAL AND TANGENTIAL TO THE DECISION OF THIS CASE.

Petitioners have attempted to justify certiorari on the theory that the court of appeals' decision conflicts with that of other circuits. They are wrong because the purported conflicts are illusory, at best. Additionally, the issues as to which petitioners allege the court of appeals' decision conflicts with those of other circuits are tangential to the results in this case.

A. Petitioners Have Failed To Show A Genuine Conflict In The Circuits Concerning The Applicable Standard Of Review.

Petitioners complain first that the Fourth Circuit Court of Appeals applied an abuse of discretion standard in reviewing the trial court's decision to abstain. According to petitioners, this creates a conflict with decisions of other circuits that apply a *de novo* standard of review on abstention issues. Petitioners, however, have oversimplified the Fourth Circuit's standard. The court of appeals did state that it "review[ed] the district court's decision to abstain under *Younger* for abuse of discretion," citing *Martin Marietta Corp. v. Maryland Commission on Human Relations*, 38 F.3d 1392, 1396 (4th Cir. 1994). Pet. App. at 4a. However, the court of appeals also cited to *Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir.

1997), for the proposition "that an error of law constitutes an abuse of discretion." Pet. App. at 4a. Then, it proceeded to review the district court's decision, first determining that the basic requirements for *Younger* abstention existed, and then exploring whether the circumstances of this case met the legal standard for an exception to *Younger*. The court of appeals' ultimate conclusion was that "[b]ecause Appellants failed to establish any of the exceptions to *Younger*," "the district court did not abuse its discretion in abstaining from adjudicating Appellants' double jeopardy claim." Pet. App. at 24a. In other words, the court of appeals examined the questions raised by petitioners and determined that the prerequisites for *Younger* abstention existed and further that petitioners failed to establish legally that any of the *Younger* exceptions applied. There was no error of law in the district court's decision, and consequently there was no abuse of discretion. In this respect, the court of appeals was applying essentially a *de novo* standard of review to determine whether abstention was required.

Contrary to petitioners' contentions, the court of appeals in this case applied an analysis equivalent to that used in other cases cited by petitioners to support their claims that the proper standard of review is *de novo*. *See, e.g., Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 637 (1st Cir. 1996) (although denial of preliminary injunction is normally an "abuse of discretion" standard, "[i]f *Younger* applies, however, abstention is mandatory"); *Riley v. Simmons*, 45 F.3d 764, 770 (3d Cir. 1995) ("We review the district court's decision to abstain for abuse of discretion, but the district court's analysis of the law on abstention is subject to de novo review."); *see*

also Schlagler v. Phillips, 166 F.3d 439, 441 (2d Cir. 1999) (citing and following *Brooks)*.

In sum, the court of appeals recognized the need to address the legal question of whether the conditions for abstention had been met, and did so. Its analysis is consistent with that of some of the very cases cited by petitioners and is not meaningfully different from cases simply citing a standard of *de novo* review. At any rate, the fine points of the standard of review had no significant effect on the decision of the court of appeals and provide no basis for this Court to grant its writ of certiorari.

B. Petitioners Have Failed To Show A Conflict Among The Circuits Concerning The Effect Of Binding State Precedent.

Petitioners also seek to persuade this Court to grant review on the theory that a conflict exists among the circuits as to whether abstention is appropriate if state court "precedent makes submitting the federal rights to a state forum futile." Pet. at 7. Petitioners cannot show a conflict in the circuits because the cases they cite for this proposition are all district court cases, and other circuit courts agree with the Fourth Circuit.

What petitioners are complaining about is the failure of the court of appeals to agree that they were entitled to obtain a preliminary injunction because the North Carolina courts have consistently determined that the State's drug tax is not a

criminal penalty on which they can base a double jeopardy claim. The court of appeals, instead, concluded that petitioners' "assertion that the North Carolina courts will likely decide a constitutional issue in a way contrary to what Appellants believe the Constitution mandates is not a sufficient basis to avoid application of *Younger* abstention." Pet. App. at 15a-16a. Other circuit courts, rather than disagreeing, have reached the same conclusion as the Fourth Circuit. *See Hansel v. Town Court for Springfield*, 56 F.3d 391, 394 (1995) (even if New York's highest court had already rejected plaintiff's claim, "[s]o long as a plaintiff is not barred on procedural or technical grounds from raising alleged constitutional infirmities, it cannot be said that state court review of constitutional claims is inadequate for *Younger* purposes"), *cert. denied*, 516 U.S. 1012 (1995); *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 224-25 (9th Cir. 1994) (regardless of whether state supreme court had upheld challenged law, *Younger* abstention applicable; "appellants do have an opportunity to raise their claims in state court because they are not procedurally barred from raising such claims"); *Duty Free Shop, Inc. v. Administracion de Terrenos*, 889 F.2d 1181, 1183 (1st Cir. 1989) (fact that state courts have rejected same or similar claims does not mean parties lack an adequate opportunity to raise those claims in state court). Thus, petitioners have failed to show a conflict in the circuits on the question of whether they have an adequate opportunity to raise their claims in state court despite the existence of contrary precedent in the state courts. The court of appeals correctly concluded that they had or have such an opportunity, and petitioners' failed efforts to conjure up a conflict among the

circuits on this issue create no basis for this Court to grant its writ of certiorari.

II. THE COURT OF APPEALS' DECISION IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *HUDSON V. UNITED STATES*, 522 U.S. 93 (1997).

Petitioners contend that the court of appeals' decision is inconsistent with this Court's opinion in *Hudson v. United States*, 522 U.S. 93 (1997). Petitioners, however, are mistaken in their analysis of *Hudson* and their characterization of the court of appeals' decision. Because the court of appeals reached the right result and did so consistently with *Hudson*, this Court should deny the petition for writ of certiorari.

Despite petitioners' arguments to the contrary, the court of appeals' decision is fully consistent with *Hudson*. In *Hudson*, this Court clarified the rules governing the determination whether a civil sanction is in fact a criminal penalty by "reaffirm[ing] the previously established rule exemplified in *United States v. Ward*, 448 U.S. 242, 248-249 (1980)." *Hudson*, 522 U.S. at 96. Under that rule, the "court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,'" and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 99-100 (quoting *Ward*, 448 U.S. at 248-49).

The court of appeals recognized what *Hudson* established as the overriding issue. Specifically, in discussing North Carolina's drug tax, the court noted that the North Carolina General Assembly has expressly stated that the "intent" of the drug tax legislation was "to raise revenue through a civil tax on this highly profitable activity . . . [and] not to create a criminal penalty." Pet. App. at 12a (quoting An Act to Amend the Excise Tax on Controlled Substances, 1998 N.C. Sess. Laws 218). However, the court of appeals never actually determined whether the relevant drug tax provisions do in fact constitute a criminal penalty under *Hudson*. Instead, the court determined that the drug tax provisions applicable to petitioners have never been addressed expressly by either federal or state courts. This is true because, as the court of appeals recognized, the North Carolina General Assembly has enacted extensive changes to the State's drug tax. They differ greatly from the statutes examined in *Lynn*, 134 F.3d at 591, which declared a prior version of the drug tax to constitute a criminal penalty. Besides the language of legislative intent, the substantive drug tax provisions were changed so that (1) the tax is payable upon receipt of drugs rather than upon a criminal violation, (2) violation of the drug tax laws is no longer a Class I felony, (3) the rate of the tax was significantly reduced, (4) the tax was expanded to cover certain categories of alcoholic beverages, and (5) the penalty was reduced from a special 100% penalty eventually to the same penalty and interest provisions applicable to all late payments of taxes in North Carolina, producing a penalty ranging from 10% to 40%. *See* Pet. App. at 11a-12a; *see also* Pet. App. at 38a-43a; App. at 9a-15a.

Petitioners thus have missed the point of the court of appeals' consideration of *Hudson*. The reason for looking at *Hudson* was not to determine definitively whether the drug tax survives a double jeopardy analysis under *Hudson*, but to determine whether the trial court erred in abstaining under *Younger*. First, the court below correctly concluded that the basic elements of *Younger* abstention existed, citing *Middlesex County*, 457 U.S. 423, for the proposition that there must be an ongoing state judicial proceeding that implicates important, substantial, or vital state interests and that provides an adequate opportunity to raise the federal constitutional issue. Pet. App. at 5a. The first two elements are plainly present in this case, and the court of appeals held that the third element was present. It looked at *Hudson* initially as part of its discussion of the ways in which the drug tax laws had changed and the fact that no court had yet evaluated the current drug tax laws, factors which went into its decision that petitioners could not show that they lacked an adequate opportunity to raise the issue in state court. Pet. App. at 8a-16a.[1]

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[1] Petitioners cited to *Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979), for the proposition that no further deference is due the state courts because, in petitioners' view, "the state's highest court has staked out its position on the issue." Pet. at 8. *Drayton*, however, is a habeas corpus case, and the point in *Drayton* was that the petitioner had exhausted his state court remedies as is required for habeas consideration. Here, petitioners have not raised their double jeopardy claim in state court. Nor have they brought this matter as a habeas claim. Significantly, the Fourth Circuit has held that habeas is not available on double jeopardy claims seeking relief from criminal prosecutions after imposition of a North Carolina drug tax, even under the older, harsher version of the drug tax. *Vick v. Williams*, 233 F.3d 213, 220-22 (4th Cir. 2000), *cert. denied*, 533 U.S. 952 (2001) (North Carolina decisions upholding drug tax not objectively unreasonable).

The court further considered whether petitioners could show a "great" or "substantial" likelihood that they would suffer any constitutional deprivation, citing *Younger*, 401 U.S. at 45 ("'danger of irreparable loss [must be] great and immediate'") and *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) ("'substantial and immediate irreparable injury' is a precondition to invoking the exception circumstances exception to *Younger* abstention"). Pet. App. at 20a. Because petitioners could not show that any threatened violation of their constitutional rights would be great or substantial, they had not shown the existence of any exception to *Younger*'s strong preference for abstention in these circumstances. In evaluating the likelihood of any violation of petitioners' rights, the court concluded that "it is arguable whether the current version of North Carolina's drug tax constitutes criminal punishment within the meaning of *Hudson*" in view of the wide-ranging amendments to the North Carolina drug tax that rendered *Lynn* non-controlling. Pet. App. at 20a. Additionally, the court of appeals observed that "it is not clear that the payment of the drug tax took place in a prior 'proceeding' within the meaning of *Hudson*." Pet. App. at 21a. Petitioners, of course, had promptly paid the drug tax assessments as soon as they received them, so it is not at all clear that those taxes were paid as part of any proceeding whatsoever[2]. What is clear is that the court of appeals correctly concluded that there was very little

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[2] Petitioners have at times suggested that the drug tax was imposed in a separate proceeding because they were subject to a lien as a result of the assessment. However, the lien triggered by the assessment is the automatic tax lien that generally attaches as a matter of law whenever a tax is due in North Carolina. *See* Pet. App. at 44a; App. at 16a-17a.

basis for petitioners' claim of a threatened double jeopardy violation.

Petitioners are further mistaken in assuming that a full *Hudson* analysis would help their cause. To the contrary, the North Carolina drug tax is not, in fact, a criminal penalty if analyzed under the factors reaffirmed in *Hudson*, factors previously set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), and endorsed in *Ward*, 448 U.S. at 249-50. *Hudson*, 522 U.S. at 99-100. Specifically, the tax does not involve an affirmative disability or restraint. Taxes have not historically been considered punishment. The tax does not depend on a finding of scienter. It is true that the tax does promote at least one traditional aim of punishment, that of deterrence, but so do other taxes and many other civil sanctions. Thus, "the mere presence of this purpose is insufficient to render a sanction criminal." *Hudson*, 522 U.S. at 105. Additionally, the behavior to which it applies is a crime, but that factor is not dispositive, as this Court held in *Hudson*. *Id.* The tax does serve an alternative purpose of raising revenue through taxing a highly profitable enterprise. N.C. GEN. STAT. § 105-113.105, Pet. App. at 38a; An Act to Amend the Excise Tax on Controlled Substances, 1998 N.C. Sess. Laws 218 (quoted in relevant part by court of appeals, Pet. App. at 12a). Finally, the tax does not appear excessive in relation to the alternative purpose assigned to it, that of raising revenue. Indeed, the petitioners paid less than $9,000.00 total for drug taxes plus penalties and interest, combined, in their efforts to avoid prosecution for the serious criminal charges

facing them[3]. Significantly, the tax is imposed as part of the North Carolina tax laws and administered by the North Carolina Secretary of Revenue in a manner that is now utterly consistent with North Carolina's general tax practices. Thus, contrary to petitioners' contentions, the *Hudson* analysis does not help their cause. Instead, it establishes the complete absence of the "clearest proof" that would be required to conclude that the drug tax provisions are criminal penalties. *Hudson*, 522 U.S. at 100.

Other courts have analyzed similar drug tax laws under the *Kennedy* factors and concluded that the taxes did not constitute criminal penalties or give rise to double jeopardy claims. *See, e.g.*, *Simpson v. Bouker*, 249 F.3d 1204, 1213 (10th Cir. 2001) (addressing Kansas drug tax); *Hill v. State*, 898 P.2d 155, 161 (Okla. Crim. App. 1995). Still other courts have upheld similar drug tax laws by applying, and distinguishing, the decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), which held that

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[3] Petitioners contend that the court of appeals placed excessive emphasis on the rate of tax. Pet. at 9. The court of appeals, however, noted the reduced rate of tax and the reduced penalty provisions partly because of the emphasis on the rate of tax and the penalty in *Lynn*, which held the prior North Carolina drug tax provisions were in fact a criminal penalty. *See Lynn*, 134 F.3d at 589-90. The drastically reduced rate of tax, of course, also made it very difficult to conclude that the present drug tax statutes are not in fact the revenue-raising provisions that the North Carolina General Assembly has declared them to be. Instead, it leads inevitably to the conclusion that North Carolina's current drug tax laws are not "so punitive either in purpose or effect as to transform what was clearly intended as a civil [tax] into a criminal penalty." *Hudson*, 522 U.S. at 99 (citations omitted).

the Montana drug tax was a criminal penalty for double jeopardy purposes. *See, e.g., Padavich v. Thalacker*, 162 F.3d 521, 523 (8th Cir. 1998), *cert. denied*, 527 U.S. 1025 (1999) (addressing Iowa drug tax in light of *Kurth Ranch* and *Hudson*); *Covelli v. Commissioner of Revenue Servs.*, 668 A.2d 699 (Conn. 1995), *vacated and remanded*, 518 U.S. 1031 (1996), *prior opinion aff'd per curiam*, 683 A.2d 737 (Conn. 1996), *cert. denied*, 520 U.S. 1174 (1997); *State v. Baehler*, 604 N.W.2d 601 (Iowa 1999) (taking *Hudson* into consideration and rejecting contention that it threw any doubt on court's earlier case law rejecting contention that Iowa drug tax was a criminal penalty); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *McMullin v. South Carolina Dep't of Revenue & Taxation*, 469 S.E.2d 600 (S.C. 1996); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994).

Admittedly, some other courts have concluded that their states' drug taxes did not pass muster. *See, e.g., People v. Maurello*, 932 P.2d 851 (Colo. Ct. App. 1997); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, 519 U.S. 296 (1996); *Commissioner of Revenue v. Mullins*, 702 N.E.2d 1 (Mass. 1998); *Desimone v. State*, 996 P.2d 405 (Nev. 2000). In so doing, however, they have generally relied on distinguishing features not present in the North Carolina statutes, such as the lack of confidentiality and protection from criminal prosecution in the Colorado statute. (North Carolina's drug tax statutes provide for confidentiality and protection from prosecution. N.C. GEN. STAT. § 105-113.112, App. at 9a.) In Indiana, the tax was due every forty-eight (48) hours and was imposed at a rate the court determined to be eight times the rate in *Kurth Ranch*. In *Mullins* and *Bryant*, the courts tended to emphasize

the implementation of the statutes "rather than focusing on the statute 'on its face,'" as required by *Hudson*[4]. *Baehler*, 604 N.W.2d at 605 (citing *Hudson*, 522 U.S. at 101). These decisions provide no support for the proposition that the North Carolina drug tax, in its current form, can be considered a criminal penalty when properly analyzed under *Hudson*.

In sum, petitioners have completely failed to show that the court of appeals' decision in any way conflicts with this Court's opinion in *Hudson*. Rather, the court of appeals examined *Hudson* to the extent necessary to determine that petitioners had failed to show any significant threat of the immediate and irreparable harm necessary to override *Younger*'s strong preference for abstention in cases seeking injunctions against pending state criminal prosecutions. Regardless of the lack of a full *Hudson* analysis, the court of appeals' decision is entirely consistent with *Hudson*. Indeed, a full *Hudson* analysis would establish that the North Carolina drug tax is not a criminal penalty, and its assessment would not trigger double jeopardy claims. Consequently, petitioners have

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[4] Requiring that a challenged statute be analyzed on its face is one of the big differences between *Hudson* and the case it overruled, *United States v. Halper*, 490 U.S. 435 (1989). Petitioners mistakenly claim that the court of appeals "disregarded" the reasoning of this Court in *Hudson* when it overruled *Halper*. As petitioners assert, this Court did so in part to avoid the consequence of the *Halper* approach that prevented a determination of the double jeopardy question until the defendant proceeded to judgment. What petitioners miss is that the remedy for this flaw in *Halper* was to return to the *Kennedy* approach of analyzing the challenged statute on its face. *Hudson*, 522 U.S. at 101-02. This is exactly what the court of appeals did.

failed to show that the court of appeals' decision is incorrect or that it conflicts with any decision of this Court.

III. PETITIONERS HAVE CITED NO ADVERSE CONSEQUENCES WHICH WOULD MAKE THIS CASE APPROPRIATE FOR REVIEW ON CERTIORARI.

Petitioners also seek review by this Court on the theory that the court of appeals' decision could cause what they characterize as "serious adverse consequences." Pet. at 10. They seek to bolster this contention by arguing that the court of appeals acted contrary to this Court's decision in *Middlesex County Ethics Comm.*, 457 U.S. 423. They are wrong in claiming that the court of appeals in any way acted contrary to *Middlesex*, and they are equally wrong in asserting that the court of appeals' decision will result in consequences that somehow justify this Court's granting its writ of certiorari.

First, petitioners claim that *Middlesex* required the plaintiff in that case to exhaust his state remedies because the New Jersey Supreme Court had specifically provided for interlocutory appeal to the state's highest court. Petitioners argue that no such interlocutory right of appeal exists for them with regard to double jeopardy claims in North Carolina. Petitioners have misread *Middlesex* and ignored the avenues they do have to raise their double jeopardy claims in state court. More precisely, in *Middlesex* the question was whether the local bar proceedings offered any avenue whatsoever for persons facing disciplinary action to raise federal constitutional

issues. *Middlesex*, 457 U.S. at 435. This Court concluded that it did. Any doubt was laid to rest by the state Supreme Court's consideration of those issues. Additionally, this Court deemed it significant that the New Jersey Supreme Court amended its rules to permit a *motion* for interlocutory review of such issues and specifying that the constitutional issues would be preserved for later consideration if the motion were not granted. *Id.* at 436 & n.15. Thus, the New Jersey rules did not guarantee review on an interlocutory basis, but merely established that the issues could be raised at the disciplinary level and, if not taken on motion by the state supreme court on an interlocutory basis, could be heard on later appeal. Under these circumstances, especially since no proceedings had occurred in federal court other than the determination of the abstention question, *Younger* required abstention. *Id.* at 436-37.

Petitioners can offer no basis for distinguishing their own ability to raise their double jeopardy claims in state court from the ability of the plaintiff in *Middlesex* to raise his federal claims. First, petitioners do not dispute that they could raise their double jeopardy claims in the North Carolina state trial courts or that they could do so on a pre-trial basis. What petitioners do contend is that they lack the *right* of pre-trial appellate review, citing North Carolina cases holding that there is no right of interlocutory appeal of a double jeopardy claim. *See, e.g.*, *State v. Shoff*, 456 S.E.2d 875 (N.C. Ct. App. 1995), *aff'd per curiam*, 466 S.E.2d 277 (N.C. 1996); *State v. Joseph*, 374 S.E.2d 132 (N.C. Ct. App. 1988), *cert. denied*, 377 S.E.2d 241 (1989). However, these cases merely follow the North Carolina Supreme Court's holding of statutory interpretation

that there are no statutory rights to interlocutory appeals in criminal cases in the North Carolina courts. *See State v. Henry*, 348 S.E.2d 593 (N.C. 1986). Not only would petitioners' double jeopardy issues, once raised at the trial level, be preserved for review on a later appeal, but there is nothing to prevent petitioners from seeking interlocutory review by filing a petition for certiorari in the North Carolina appellate courts. Rule 21 of the North Carolina Rules of Appellate Procedure expressly permits petitions for certiorari, among other circumstances, "when no right of appeal from an interlocutory order exists." Thus, petitioners are afforded the same types of appellate avenues that were approved by this Court in *Middlesex,* a petition for certiorari for petitioners here versus a motion to the state supreme court in *Middlesex,* seeking interlocutory review, which is not guaranteed in either case, or the opportunity to raise the issues on a subsequent appeal. *Middlesex* does not provide petitioners any relief from the court of appeals' decision; instead, it teaches that *Younger* abstention was entirely appropriate, as the court of appeals determined.

Finally, petitioners seek to justify this Court's review of their claims on the theory that otherwise the state court criminal proceeding will be further disrupted. According to them, they will re-file in federal court under 42 U.S.C. § 1983 once the state courts reject their double jeopardy claims, assuming the state courts do in fact reject those claims. Petitioners suggest this Court should grant its writ of certiorari to avoid the disruption to the parties and the state court criminal proceeding that will necessarily result once they re-file their § 1983 action. Of course, petitioners could avoid this disruption if they did not

re-file the § 1983 action. Doing so is unlikely to benefit them since the court of appeals abstained only in part because petitioners had not exhausted potential pre-trial remedies, *see* Pet. App. at 18a-19a &19a n.13, but also because petitioners were unable to show that the threat of harm was substantial in view of the serious questions about the viability of their double jeopardy claims, Pet. App. at 20a-23a. Petitioners are therefore highly unlikely to prevail on their double jeopardy claims under any circumstances. The claims petitioners present do not merit the Court's review, and their threats of continued litigation are insufficient grounds for this Court to grant its writ of certiorari.

CONCLUSION

Petitioners have offered no compelling reason for this Court to grant its writ of certiorari, and the Petition should be denied.

Respectfully submitted,

ROY COOPER
ATTORNEY GENERAL

Norma W. Harrell*
Special Deputy Attorney General
State Bar No. 6654

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May 9, 2003

*Counsel of Record

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:01CV582-MLK

KENNETH SCOTT NIVENS,
GLEN LANCE MANERS,
TERRI LYNN STORK, individually
and as representatives of a class
pursuant to Rule 23, Fed.R.Civ.P, **COMPLAINT**
Plaintiffs,

v.

PETER S. GILCHRIST, III,
in his official capacity as District
Attorney for the 26th Prosecutorial
District for the State of North
Carolina, and as representative of a
class pursuant Rule 23, Fed.R.Civ.P.,
Defendant.

PRELIMINARY STATEMENT

1. This is a civil rights action in which the plaintiffs, for themselves and those similarly situated, seeks to have this Court declare unlawful prosecution on indictments which allege conduct for which the State of North Carolina has already exacted criminal penalties through a drug tax assessment, under extraordinary circumstances in which, *inter alia,* there is a conflict between the interpretation of the state's drug tax statute and Fifth Amendment Double Jeopardy Clause

by the state's highest court and United States Court of Appeals for the Fourth Circuit.

2. This action arises under 42 U.S.C. §1983; the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; and the Fifth and Fourteenth Amendments to the United States Constitution.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights).

PARTIES

4. The plaintiffs are defendants in several related indictments joined for trial in the Mecklenburg County, North Carolina, Superior Court, involving allege conduct for which the State of North Carolina has already exacted criminal penalties through a drug tax assessment, and a claim of double jeopardy was not addressed by the state court.

5. The defendant is the Honorable Peter S. Gilchrist, III, in his official capacity as the District Attorney for the 26th Prosecutorial District consisting of Mecklenburg County, North Carolina. Mr. Gilchrist was elected to that position pursuant to Article IV §18 of the North Carolina Constitution and N.C.G.S. Chapter 7-A. Mr. Gilchrist is responsible for the prosecution of violations of the state criminal laws in the 26th Prosecutorial District, Mecklenburg, North Carolina. Mr. Gilchrist personally or through his assigned assistant district attorneys obtained the indictments against the plaintiffs and calendared those matters for trial in Mecklenburg County Superior Court. Mr. Gilchrist is sued only in his official capacity.

6. The plaintiff's class is defined as persons (1) with pending indictments or convictions that have not become final,

(2) involving alleged conduct for which the State of North Carolina has already exacted criminal penalties through a drug tax assessment, and (3) a claim of double jeopardy was not addressed by the state court. Based upon information and belief, there are at least hundreds of individuals who qualify as class plaintiffs, who have in common the fact that they have been or will be assessed the drug tax and then prosecuted by Mr. Gilchrist or one or more of the class defendants, the plaintiffs' cases and the class plaintiffs' cases are typical, and adequately addressed by plaintiffs' counsel in this proceeding, and the class plaintiffs would be prejudiced by a decision in the case of the plaintiffs, and the relief sought is primarily declaratory and injunctive.

7. The defendant's class is defined as every district attorney for each county of the State of North Carolina. Based upon information and belief, there are 38 who qualify as class defendants, excluding Mr. Gilchrist, who have in common the fact that they are or will be prosecuting those assessed the drug tax, and are related by a juridical link in that they act on behalf of the State of North Carolina in the aforementioned prosecutions, *see, e.g., Monaco v. Stone,* 187 F.F.D. 50, 65-66 (E.D.N.Y. 1999)(the State of New York's criminal court judges are related by juridical link); *Luyand* v. *Bowen,* 124 F.R.D. 52, 58 (S.D.N.Y. 1989)(the State of
New York's 58 social services district commissioners are related by a juridical link), Mr. Gilchrist's case and the class defendants' cases are typical, and adequately addressed by Mr. Gilchrist in this proceeding, the class defendants would be prejudiced by a decision in the case of the plaintiffs' claim against Mr. Gilchrist, the relief sought is primarily declaratory

and injunctive, and there are common questions of law in the instant case which predominate over issues which affect only individual class members and class action treatment of the claims is superior to other available methods for the fair and efficient resolution of the case.

STATEMENT OF THE CLAIM

8. At all times relevant herein, Mr. Gilchrist and other class defendants have acted and will continued to act in their official capacity and under color of state law.

9. On July 8, 2000, the plaintiffs were arrested and subsequently charged with various violations of the North Carolina Controlled Substance Act relating to the alleged sale of 15 ecstasy pills by Ms. Stork on June 9, 2000, to an undercover police officer, (00CRS31384 through 31386), the alleged sale of 125 ecstasy pills by Chad Hess on July 8, 2000, to that same undercover police officer, (00CRS31387), the alleged sale of 184 ecstasy pills by Mr. Nivens on July 8, 2000, to Mr. Maners, (00CRS28894 through 28895, 00CRS28913, 00CRS28919, and 01CRS116689), and alleged possession of 701 ecstasy pills by Mr. Nivens on July 8, 2000, in a car driven by Ms. Stork (00CRS28893, 28916, 28917, 28920, and 01CRS116688).

10. In July, 2000, Ms. Stork, Mr. Nivens, and Mr. Maners were assessed with tax, penalty, and interest under the provisions of the North Carolina Controlled Substance Tax Act, N.C.G.S. §105-2D, in the amount *of* $6,259.67, which was paid in full that same month. This drug tax was assessed on the 884 ecstasy pills that are the subject of indictments 00CRS28893

through 28895, 28913, 28916, 28917, 28919, 28920, and 01CRS116688 and 116689.

11. In July, 200, Mr. Maners was assessed with tax, penalty, and interest under the provisions of the North Carolina Controlled Substance Tax Act N.C.G.S. §§ 105-2D, in the amount *of* $1,336.33, which was paid in full the following month. This drug tax was assessed on the 184 ecstasy pills that are the subject of indictments 00CRS28893 through 28895.

12. In January, 2001, Ms. Stork was assessed with tax, penalty, and interest under the provisions of the North Carolina Controlled Substance Tax Act N.C.G.S. §§105-2D, in the amount of $1,081.13, which was paid in full the following month. This drug tax was assessed on the 140 ecstasy pills that are the subject of indictments 00CRS31384 through 31387.

13. Under North Carolina precedence interpreting the North Carolina Controlled Substance Tax Act and the United States Constitution, the tax is not a criminal penalty and therefore tax assessment proceedings followed by indictments for the same conduct do not violate the Double Jeopardy Clause. See, e.g., *State* v. *Ballenger,* 345 N.C. 626 (1997); *see also State* v. *Creason,* 346 N.C. 165 (1997).

14. Under United States Court of Appeals precedence interpreting the North Carolina Controlled Substance Tax Act and the United States Constitution, the tax is a criminal penalty and therefore tax assessment proceedings followed by indictments for the same conduct violate the Double Jeopardy Clause. *Lynn* v. *West,* 134 F.3d 582 (4th Cir. 1998).

15. If Mr. Gilchrist and the class defendants are not enjoined from subjecting the plaintiffs and class plaintiffs to a criminal trial on indictments which alleged conduct for which

the State of North Carolina has already imposed criminal penalties, Mr. Gilchrist and the class defendants will subject the plaintiffs and class plaintiffs to the great and immediate irreparable deprivation of their right to be free from double jeopardy, as secured by the Fifth and Fourteenth Amendments, without adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully requests that this Court:

1. Assume jurisdiction of this matter;

2. Certify the plaintiffs' class pursuant to Rule 23(a), (b)(1)(A), (b)(1)(B), and (b)(2), Fed.R.Civ.P., and the defendant's class pursuant to Rule 23(a), (b)(l)(A), (b)(l)(B), (b)(2), and (b)(3), Fed.R.Civ.P.

3. Enter a declaratory judgment declaring that for the Mr. Gilchrist and class defendants to subject the plaintiffs and the class plaintiffs to a criminal trial, after the State of North Carolina assessed a criminal penalty against the plaintiffs and the class plaintiffs pursuant to the North Carolina Controlled Substance Tax Act, would unconstitutionally violate the plaintiffs' right and the class plaintiffs' right to be free from double jeopardy, and subject the plaintiffs and class plaintiffs to great and immediate irreparable injury.

4. Enter an injunction restraining Mr. Gilchrist from subjecting the plaintiffs to a trial on the above-referenced indictments;

5. Enter an injunction restraining Mr. Gilchrist and the class defendants from subjecting class plaintiffs to a trial, after

the State of North Carolina has assessed a criminal penalty against class plaintiffs pursuant to the North Carolina Controlled Substance Tax Act;

6. Enter judgment against Mr. Gilchrist and the class defendants in the sum of court costs and reasonable attorneys fees pursuant to 42 U.S.C. §1988, see *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736-37 (1980); and,

7. Enter such other and further relief as the Court deems just and proper.

Respectfully submitted,

This 18th day of October, 2001.

/s/Randolph Marshall Lee
Attorney for Mr. Nivens

/s/ Richard A. Culler
Attorney for Mr. Maners

/s/ Aaron E. Michel
Attorney for Ms. Stork

STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF MECKLENBURG

Pursuant to Title 28, United States Code, Section 1746, and Title 18, United States Code, Section 1621, we, Randolph Marshall Lee, Richard A. Culler, and Aaron E. Michel, declare under penalty of perjury that we have read the foregoing Complaint and it is true and correct to the best of our knowledge and belief. We declare under penalty of perjury that the foregoing verification is true and correct.

This the 18th day of October, 2001.

/s/Randolph Marshall Lee
Attorney for Mr. Nivens

/s/ Richard A. Culler
Attorney for Mr. Maners

/s/ Aaron E. Michel
Attorney for Ms. Stork

Certificate of Service

The undersigned certifies that a copy of the foregoing was served upon the defendant Peter S. Gilchrist, III, by faxing it to him at 704-347-7891 and mailing it to him first class certified mail return receipt requested to Peter S. Gilchrist, III, 700 E. Trade St, 2nd Fl., Charlotte, NC 28202-3016, on October 18, 2001.

/s/ Aaron E. Michel

RELEVANT 2000
NORTH CAROLINA GENERAL STATUTES

§ 105-113.112. Confidentiality of information

Notwithstanding any other provision of law, information obtained pursuant to this Article is confidential and may not be disclosed or, unless independently obtained, used in a criminal prosecution other than a prosecution for a violation of this Article. Stamps issued pursuant to this Article may not be used in a criminal prosecution other than a prosecution for a violation of this Article. A person who discloses information obtained pursuant to this Article is guilty of a Class 1 misdemeanor. This section does not prohibit the Secretary from publishing statistics that do not disclose the identity of dealers or the contents of particular returns or reports. (1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14(c); 1997, c. 292, s. 1.)

§ 105-236. Penalties

Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

(1) Penalty for Bad Checks. -- When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department returns the check because of insufficient funds or the nonexistence of an account

of the drawer, the Secretary shall assess a penalty equal to ten percent (10%) of the check, subject to a minimum of one dollar ($ 1.00) and a maximum of one thousand dollars ($ 1,000). This penalty does not apply if the Secretary finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution in this State to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds.

(1a) Penalty for Bad Electronic Funds Transfer. -- When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Secretary shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($ 1.00) and a maximum of one thousand dollars ($ 1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(1b) Making Payment in Wrong Form. -- For making a payment of tax in a form other than the form required by the Secretary pursuant to G.S. 105-241(a), the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax, subject to a minimum of one dollar ($ 1.00) and a maximum of one thousand dollars ($ 1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(2) Failure to Obtain a License. -- For failure to obtain a license before engaging in a business, trade or

profession for which a license is required, the Secretary shall assess a penalty equal to five percent (5%) of the amount prescribed for the license per month or fraction thereof until paid, not to exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars ($ 5.00).

(3) Failure to File Return. -- In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($ 5.00), whichever is the greater.

(4) Failure to Pay Tax When Due. -- In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars ($ 5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When a tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax.

(5) Negligence. --

a. Finding of negligence. -- For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

b. Large individual income tax deficiency. -- In the case of individual income tax, if a taxpayer understates taxable income, by any means, by an amount equal to twenty-five percent (25%) or more of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency. For purposes of this subdivision, "gross income" means gross income as defined in section 61 of the Code.

c. Other large tax deficiency. -- In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

d. No double penalty. -- If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

e. Inheritance and gift tax deficiencies. -- This subdivision does not apply to inheritance, estate, and gift tax deficiencies that are the result of valuation understatements.

. . . .

(6) Fraud. -- If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency.

(7) Attempt to Evade or Defeat Tax. -- Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.

(8) Willful Failure to Collect, Withhold, or Pay Over Tax. -- Any person required to collect, withhold, account for, and pay over any tax who willfully fails to collect or truthfully account for and pay over the tax shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9) Willful Failure to File Return, Supply Information, or Pay Tax. -- Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a Class

1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9a) Aid or Assistance. -- Any person, pursuant to or in connection with the revenue laws, who willfully aids, assists in, procures, counsels, or advises the preparation, presentation, or filing of a return, affidavit, claim, or any other document that the person knows is fraudulent or false as to any material matter, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present or file the return, affidavit, claim, or other document, shall be guilty of a Class H felony.

(10) Failure to File Informational Returns. --

a. Repealed by Session Laws 1998-212, s. 29A.14(m), effective January 1, 1999.

b. The Secretary may request a person who fails to file timely statements of payment to another person with respect to wages, dividends, rents, or interest paid to that person to file the statements by a certain date. If the payer fails to file the statements by that date, the amounts claimed on the payer's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payer failed to comply with the Secretary's request with respect to the statements.

c. For failure to file an informational return

required by Article 36C or 36D of this Chapter by the date the return is due, there shall be assessed a penalty of fifty dollars ($ 50.00).

. . . .

(11) Any violation of Subchapter I, V, or VIII of this Chapter or of Article 3 of Chapter 119 of the General Statutes is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied.

(12) Repealed by Session Laws 1991, c. 45, s. 27. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983; 1987 (Reg. Sess., 1988), c. 1076; 1989, c. 557, ss. 7 to 10; 1989 (Reg. Sess., 1990), c. 1005, s. 9; 1991, c. 45, s. 27; 1991 (Reg. Sess., 1992), c. 914, s. 2; c. 1007, s. 10; 1993, c. 354, s. 22; c. 450, s. 10; c. 539, ss. 709, 710, 1292, 1293; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 390, s. 36; 1995 (Reg. Sess., 1996), c. 646, s. 10; c. 647, s. 51; c. 696, s. 1; 1997-6, s. 8; 1997-109, s. 3; 1998-178, ss. 1, 2; 1998-212, s. 29A.14(m); 1999-415, ss. 2, 3; 1999-438, ss. 15, 16; 2000-119, s. 2; 2000-120, s. 7; 2000-140, s. 70.)

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§ 105-241. Where and how taxes payable; tax period; liens

(a) Form of Payment. -- Taxes are payable in the national currency. The Secretary shall prescribe where taxes are to be paid and whether taxes must be paid in cash, by check, by electronic funds transfer, or by another method.

(b) Electronic Funds Transfer. -- Except as provided in G.S. 105-163.40, the Secretary shall not require a taxpayer to pay a tax by electronic funds transfer unless, during the applicable period for that tax, the average amount of the taxpayer's required payments of the tax was at least twenty thousand dollars ($ 20,000) a month. The twenty thousand dollar ($ 20,000) threshold applies separately to each tax. The applicable period for a tax is a 12-month period, designated by the Secretary, preceding the imposition or review of the payment requirement. The requirement that a taxpayer pay a tax by electronic funds transfer remains in effect until suspended by the Secretary. Every 12 months after requiring a taxpayer to pay a tax by electronic funds transfer, the Secretary shall determine whether, during the applicable period for that tax, the average amount of the taxpayer's required payments of the tax was at least twenty thousand dollars ($ 20,000) a month. If it was not, the Secretary shall suspend the requirement that the taxpayer pay the tax by electronic funds transfer and shall notify the taxpayer in writing that the requirement has been suspended.

(c) Tax Period. -- Except as otherwise provided in this Chapter, taxes are levied for the fiscal year of the state in which they became due.

(d) Lien. -- This subsection applies except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article. The lien of a tax attaches to all real and personal property of a taxpayer on the date a tax owed by the taxpayer becomes due. The lien continues until the tax and any interest, penalty, and costs associated with the tax are paid. A tax lien is not extinguished by the sale of the taxpayer's property. A tax lien, however, is not enforceable against a bona fide purchaser for value or the holder of a duly recorded lien unless:

(1) In the case of real property, a certificate of tax liability or a judgment was first docketed in the office of the clerk of superior court of the county in which the real property is located.

(2) In the case of personal property, there has already been a levy on the property under an execution or a tax warrant.

The priority of these claims and liens is determined by the date and time of recording, docketing, levy, or bona fide purchase.

If a taxpayer executes an assignment for the benefit of creditors or if insolvency proceedings are instituted against a taxpayer who owes a tax, the tax lien attaches to all real and personal property of the taxpayer as of the date and time the taxpayer executes the assignment for the benefit of creditors or the date and time the insolvency proceedings are instituted. In these cases, the tax lien is subject only to a prior recorded specific lien and the reasonable costs of administering the assignment or the insolvency proceedings. (1939, c. 158, s. 912; 1949, c. 392, s. 6; 1957, c. 1340, s. 5; 1993, c. 450, s. 2; 1999-389, s. 8.)

§ 105-241.1. Additional taxes; assessment procedure

(a) Proposed Assessment. -- If the Secretary discovers that any tax is due from a taxpayer, the Secretary must notify the taxpayer in writing of the kind and amount of tax due and of the Secretary's intent to assess the taxpayer for the tax. The notice must describe the basis for the proposed assessment and identify the amounts of any tax, interest, additions to tax, and penalties included in the proposed assessment. The notice must also advise the taxpayer that the proposed assessment will become final unless the taxpayer requests a hearing within the time set in subsection (c) of this section.

The Secretary must base a proposed assessment on the best information available. A proposed assessment of the Secretary is presumed to be correct.

(b) Delivery of Notice. -- The Secretary shall deliver the notice of a proposed assessment to a taxpayer either in person or by United States mail sent to the taxpayer's last known address. A notice mailed to a taxpayer is presumed to have been received by the taxpayer unless the taxpayer makes an affidavit to the contrary within 90 days after the notice was mailed. If the taxpayer makes this affidavit, the time limitations in subsection (c) apply as if the notice had been delivered on the date the taxpayer makes the affidavit.

(c) Hearing. -- A taxpayer who objects to a proposed assessment of tax is entitled to a hearing before the Secretary as provided in this subsection. To obtain a hearing, the taxpayer must file a written request either for a hearing or for a written statement of the information and evidence upon which the proposed assessment is based. If the notice of a proposed

assessment was mailed, the taxpayer's request must be filed within 30 days after the date the notice was mailed; if the notice of a proposed assessment was delivered in person, the taxpayer's request must be filed within 30 days after the date the notice was delivered.

When a taxpayer files a timely request for a written statement of the information and evidence upon which a proposed assessment is based, the Secretary must give the written statement to the taxpayer within 45 days after the taxpayer filed the request. A taxpayer who files a timely request for a written statement concerning a proposed assessment and who desires to have a hearing on the proposed assessment must file a written request for a hearing within 30 days after the written statement was mailed.

When a taxpayer files a timely request for a hearing, the Secretary must set the time and place at which the hearing will be conducted and must notify the taxpayer of the designated time and place within 60 days after the taxpayer filed the request for a hearing and at least 10 days before the date set for the hearing. The date set for the hearing must be within 90 days after the timely request for a hearing was filed or at a later date mutually agreed upon by the taxpayer and the Secretary. The date set for the hearing may be postponed once at the request of the taxpayer and once at the request of the Secretary for a period of up to 90 days or for a longer period mutually agreed upon by the taxpayer and the Secretary.

The taxpayer may present any objections to the proposed assessment at the hearing. The rules of evidence do not apply at the hearing.

Within 90 days after the Secretary conducts a hearing on

a proposed assessment, the Secretary must make a decision on the proposed assessment and notify the taxpayer of the decision. The decision must assess the taxpayer for the amount of any tax the Secretary determined to be due.

(d) Assessment. -- If a taxpayer does not apply for a hearing in accordance with subsection (c) of this section, a proposed assessment becomes final without further notice. If a taxpayer applies for a hearing in accordance with subsection (c) of this section, a proposed assessment becomes final when the taxpayer is notified of the decision made after the hearing. An assessment that is final is immediately due and collectible. G.S. 105-241.2, 105-241.3, and 105-241.4 apply to a tax assessed under this section.

Except in the case of a jeopardy assessment, the Secretary may not assess a taxpayer for a tax until the notice required by subsection (a) has been given and one of the following has occurred:

(1) The time for applying for a hearing has expired.
(2) The Secretary and the taxpayer have agreed upon a settlement.
(3) The taxpayer has filed a timely application for a hearing and the Secretary, after conducting the hearing, has given the taxpayer written notice of the decision.

(d1) Notice of Assessment. -- The Secretary must notify the taxpayer when a proposed assessment becomes final and is therefore collectible. The notice must identify the amounts of any tax, interest, additions to tax, and penalties included in the assessment. The notice must include or be accompanied by a brief statement in simple and nontechnical terms of all of the

following:

(1) The Department's authority to, and procedure for, levy on and sale of the taxpayer's property.

(2) The taxpayer's available administrative appeals regarding the levy and sale of property, including the procedures for appeal.

(3) Other options available to the taxpayer that could prevent levy on the property.

(4) Procedures to redeem property and obtain release of a lien on property.

(e) Statute of Limitations. -- There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if (i) the taxpayer did not file a proper application for a license or did not file a return, (ii) the taxpayer filed a false or fraudulent application or return, or (iii) the taxpayer attempted in any manner to fraudulently evade or defeat the tax.

If a taxpayer files a return reflecting a federal determination as provided in G.S. 105-29, 105-130.20, 105-159, 105-160.8, 105-163.6A, or 105-197.1, the Secretary must propose an assessment of any tax due within one year after the return is filed or within three years of when the original return was filed or due to be filed, whichever is later. If there is a federal determination and the taxpayer does not file the required return, the Secretary must propose an assessment of any tax due within three years after the date the Secretary received the final report of the federal determination.

If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions of this Chapter, the Secretary must assess any tax due as a result of the forfeiture within three years after

the date of the forfeiture. If a taxpayer elects under section 1033(a)(2)(A) of the Code not to recognize gain from involuntary conversion of property into money, the Secretary must assess any tax due as a result of the conversion or election within the applicable period provided under section 1033(a)(2)(C) or section 1033(a)(2)(D) of the Code. If a taxpayer sells at a gain the taxpayer's principal residence, the Secretary must assess any tax due as a result of the sale within the period provided under section 1034(j) of the Code.

In all other cases, the Secretary must propose an assessment of any tax due from a taxpayer within three years after the date the taxpayer filed an application for a license or a return or the date the application or return was required by law to be filed, whichever is later.

If the Secretary proposes an assessment of tax within the time provided in this section, the final assessment of the tax is timely.

A taxpayer may make a written waiver of any of the limitations of time set out in this subsection, for either a definite or an indefinite time. If the Secretary accepts the taxpayer's waiver, the Secretary may propose an assessment at any time within the time extended by the waiver.

(f) Repealed by Session Laws 1993, c. 532, s. 2.

(g) Jeopardy Assessments. -- Notwithstanding any other provision of this section, the Secretary may at any time within the applicable period of limitations immediately assess any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State. For a jeopardy assessment, the Secretary

may give the taxpayer the notice of proposed assessment required by subsection (a) any time within 30 days after the jeopardy assessment is made. The taxpayer may request a hearing on the jeopardy assessment by following the procedure described in the notice.

Within five days after a jeopardy assessment is made under this subsection that is not the result of a criminal investigation or of a liability for a tax imposed under Article 2D of this Chapter, the Secretary must provide the taxpayer with a written statement of the information upon which the Secretary relied in making the assessment. Within 30 days after receipt of this written statement or, if no statement is received, within 30 days after the statement was due, the taxpayer may request the Secretary to review the action taken. After receipt of this request, the Secretary must determine whether making the jeopardy assessment was reasonable under all the circumstances and whether the amount assessed is reasonable under all the circumstances. The Secretary must give the taxpayer written notice of this determination within 30 days after the request. The taxpayer may seek judicial review of this determination as provided in G.S. 105-241.5.

(h) Repealed by Session Laws 1993, c. 532, s. 2.

(i) Interest. -- All assessments of tax, exclusive of penalties assessed on the tax, shall bear interest at the rate established pursuant to this subsection from the time the tax was due until paid. On or before June 1 and December 1 of each year, the Secretary shall establish the interest rate to be in effect during the six-month period beginning on the next succeeding July 1 and January 1, respectively, after giving due consideration to current market conditions and to the rate that will be in effect

on that date pursuant to the Code. If no new rate is established, the rate in effect during the preceding six-month period shall continue in effect. The rate established by the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year.

(i1) Repealed by Session Laws 1993, c. 532, s. 2.

(j) Construction. -- This section is in addition to and not in substitution of any other provision of the General Statutes relative to the assessment and collection of taxes. (1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 1259, s. 8; 1969, c. 1132, s. 1; 1973, c. 476, s. 193; c. 1287, s. 13; 1977, c. 657, s. 6; c. 1114, ss. 1, 11; 1981 (Reg. Sess., 1982), c. 1211, s. 2; c. 1223, s. 4; 1987, c. 827, s. 21; 1989, c. 530; 1993, c. 443, s. 6; c. 532, s. 2; 1993 (Reg. Sess., 1994), c. 582, s. 5; c. 745, s. 14; 1995, c. 17, s. 18; c. 468, s. 2; 1995 (Reg. Sess., 1996), c. 646, s. 11; 1996, 2nd Ex. Sess., c. 13, s. 3.7; 1999-360, s. 16; 2000-140, s. 88.)